

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





77-2090

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P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

JOSEPH MARCERA, and JOHN DILLMAN,  
Individually and on behalf of all others  
similarly situated,

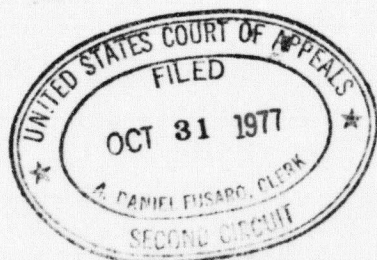
Plaintiffs-Appellants

-vs-

STEPHEN CHINLUND, JOSEPH WASSER, and  
DOROTHY WADSWORTH, Individually and in  
their official capacities as members of the  
New York State Commissioner of Correction,  
and WILLIAM LOMBARD, Individually and in his  
official capacity as Sheriff of Monroe  
County and on behalf of all other persons  
similarly situated,

Defendants-Appellees

REPLY BRIEF



MONROE COUNTY LEGAL ASSISTANCE CORPORATION  
DAVID W. BEIER III, OF COUNSEL  
Attorney for Plaintiffs/Appellants  
Office and P.O. Address  
80 West Main Street  
Rochester, New York 14614  
Tel. No. 716-325-2520

## TABLE OF CONTENTS

|                                                                                                                                                                | <u>PAGE</u> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| QUESTIONS PRESENTED.....                                                                                                                                       | 1           |
| POINT I                                                                                                                                                        |             |
| THE MOOTNESS DOCTRINE SHOULD NOT BE<br>INVOKED TO DEFEAT THE CLAIMS OF<br>PLAINTIFFS CONFINED IN PRE-TRIAL<br>DETENTION WHICH IS, BY NATURE,<br>TEMPORARY..... | 2           |
| POINT II                                                                                                                                                       |             |
| PULLMAN ABSTENTION IS NOT WARRANTED IN<br>A CASE INVOLVING ONLY FEDERAL CONSTITUTIONAL<br>CLAIMS AND NO STATE LAW ISSUES HAVE BEEN<br>PRESENTED.....           | 4           |
| POINT III                                                                                                                                                      |             |
| THIS COURT HAS APPELLATE JURISDICTION TO<br>REVIEW THE DENIAL OF A CLASS CERTIFICATION<br>MOTION.....                                                          | 7           |
| POINT IV                                                                                                                                                       |             |
| DENIAL OF PLAINTIFFS' REQUEST FOR A<br>PRELIMINARY INJUNCTION WITHOUT<br>HOLDING A HEARING WAS IMPROPER.....                                                   | 10          |
| POINT V                                                                                                                                                        |             |
| THE DISTRICT COURT FAILED TO FOLLOW THE<br>LAW OF THIS CIRCUIT IN DENYING PLAINTIFFS<br>PRELIMINARY RELIEF.....                                                | 13          |
| CONCLUSION.....                                                                                                                                                | 15          |



# TABLE OF AUTHORITIES

| <u>CASES</u>                                                                                                                     | <u>PAGE</u> |
|----------------------------------------------------------------------------------------------------------------------------------|-------------|
| <u>Ambrose v. Malcolm</u> , ___ F.Supp. ___ (Civ. No. 190,<br>S.D.N.Y., 5/16/77).....                                            | 8           |
| <u>Board of School Commissioners v. Jacobs</u> , 420 U.S. 128<br>(1975).....                                                     | 2           |
| <u>Burford v. Sun Oil Co.</u> , 319 U.S. 315 (1943).....                                                                         | 4           |
| <u>Colorado R. Water Cons. Dist v. U.S.</u> , 424 U.S. 800<br>(1976).....                                                        | 4           |
| <u>County of Allegany v. Frank Mashuda Co.</u> , 360 U.S. 185,<br>188-189 (1959).....                                            | 4           |
| <u>Detainees of Brooklyn House of Detention v.</u><br><u>Malcolm</u> , 520 F.2d 392, 399 (2nd Cir. 1975).....                    | 6,12        |
| <u>Gerstein v. Pugh</u> , 420 U.S. 103 (1975).....                                                                               | 2,3         |
| <u>Green v. Wolf Corp.</u> , 406 F.2d 291 (2nd Cir. 1969),<br>cert. denied 395 U.S. 977 (1969).....                              | 7           |
| <u>Jones v. Diamond</u> , 519 F.2d 1090, 1097-1098 (1975).....                                                                   | 3           |
| <u>Inmates of Suffolk County Jail v. Eisenstadt</u> , 494<br>F.2d 1196 (1st Cir. 1974), cert denied, 419 U.S.<br>977 (1975)..... | 14          |
| <u>Lasky v. Quinlan</u> , 419 F.Supp. 799 (SDNY, 1976)<br>reversed on other grounds, 558 F.2d 1133 (2nd Cir<br>1977).....        | 11          |
| <u>McNulty v. Chinlund</u> , 89 Misc.2d 273 (Sup. Ct. Albany<br>City, 1977).....                                                 | 4,5         |
| <u>McRedmond v. Wilson</u> , 533 F.2d 757 (2nd Cir. 1976).....                                                                   | 4,5         |
| <u>Munthews Corp. v. Burgess Industries Corp.</u> , 535<br>F.2d 210, 211 (2nd Cir. 1976).....                                    | 8           |
| <u>Pearson v. Ecological Service Corp</u> , 522 F.2d 171, 177<br>(1st Cir. 1975), cert. denied, 425 U.S. 912 (1976).....         | 2           |
| <u>Procunier v. Martinez</u> , 416 U.S. 366, 405-406 (1974).....                                                                 | 5           |

TABLE OF AUTHORITIES CONT'D

| <u>CASES</u>                                                                                                                                               | <u>PAGE</u> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <u>Railroad Commission of Texas v. Pullman Co.</u> , 312 U.S. 496, (1941).....                                                                             | 4           |
| <u>Rhem v. Malcolm</u> , 527 F.2d 1041 (2nd Cir, 1975).....                                                                                                | 13          |
| <u>Rhem v. McGrath</u> , 326 F.Supp. 681 (S.D.N.Y. 1971)<br>Supplemental opinion at trial, 371 F.Supp. 594<br>(1974), aff'd, 507 F.2d (2nd Cir. 1974)..... | 12          |
| <u>Shayne v. Madison Square Garden Corp.</u> , 491 F.2d 797 (2nd Cir. 1974).....                                                                           | 7           |
| <u>Sosna v. Iowa</u> , 419 U.S. 393 (1975).....                                                                                                            | 2           |
| <u>Wisconsin v. Constantineau</u> , 400 U.S. 433, 440 (1971)....                                                                                           | 5           |
| <u>Younger v. Harris</u> , 401 U.S. 37 (1971).....                                                                                                         | 4           |
| <u>Zurak v. Regan</u> , 550 F.2d 86, 91-92 (2nd Cir. 1977)<br>cert. denied, 97 Sup. Ct. 2988 (1977).....                                                   | 3           |
| <br><u>STATUTES</u>                                                                                                                                        |             |
| United States Code:<br>28 U.S.C. §1291(a)(1).....                                                                                                          | 7           |
| Federal Rule 23.....                                                                                                                                       | 8,9         |
| New York Laws:<br>§500-c Correction Law.....                                                                                                               | 12          |
| <br><u>OTHER AUTHORITIES</u>                                                                                                                               |             |
| Moore's Federal Practice, Sections 21.04[1].....                                                                                                           | 12          |
| Moore's Federal Practice, Section 23.50.....                                                                                                               | 2           |
| <br>Note: Appealability of Class Action<br>Determinations, 44 Fordham L. Rev. 548 (1975). 7                                                                |             |



QUESTIONS PRESENTED

Whether the mootness doctrine may be invoked to defeat the claims of plaintiffs confined in pre-trial detention?

Whether Pullman abstention is warranted in a case involving only federal constitutional claims and no issues of state law?

Whether this Court has jurisdiction to review the District Court's denial of class certification and preliminary relief?

Whether the District Court erroneously denied plaintiffs' motion for preliminary relief?

POINT I

THE MOOTNESS DOCTRINE SHOULD NOT BE  
INVOKED TO DEFEAT THE CLAIMS OF  
PLAINTIFFS CONFINED IN PRE-TRIAL  
DETENTION WHICH IS, BY NATURE,  
TEMPORARY

Defendant Lombard suggests that the instant proceeding should be dismissed as moot.<sup>1</sup> In so doing, defendant Lombard simply ignores the recent Supreme Court cases which have discussed the relationship between class certification and the Article III case or controversy requirement. Sosna v. Iowa, 419 U.S. 103 (1975); Bd of School Commissioner's v. Jacobs, 420 U.S. 128 (1975); Gerstein v. Pugh, 420 U.S. 103 (1975).

There is no question that both of the named plaintiffs are no longer pre-trial detainees. However at least one of the named plaintiffs was a pre-trial detainee at the time of plaintiffs' motion for class certification was made.<sup>2</sup> To permit dismissal of the instant appeal as moot would be to sanction unwarranted delays by district courts.<sup>3</sup>

Moreover, defendant Lombard's suggestion that this case is moot is indefensible in light of the Supreme Court decision

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<sup>1</sup>  
Defendant Lombard's Brief, at pg. 5-6.

<sup>2</sup>  
Defendant Lombard's Brief, at pg. 4. Despite the admonition of Federal Rule 23(c)(1) and the directions of the Supreme Court in Bd. of School Comm'rs v. Jacobs, 420 U.S. 128 (1975) the District Court has yet to rule on this motion.

<sup>3</sup>  
Additionally a dismissal at this point runs counter to the general rule that once a case is plead as a class action it remains one until there has been a determination on a class motion. Pearson v. Ecological Service Corp., 522 F.2d 171, 177 (5th Cir 1975) cert denied 425 U.S. 912 (1976); Moore's Federal Practice, §23.50 pg. 23-1103 (2nd Ed. 1971)



in Gerstein v. Pugh.

There the Court held that class certification is especially appropriate in actions by pre-trial detainees since:

Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

420 U.S. at n.10.

Here, plaintiffs' claims are similarly "capable of repetition, yet evading review". This Court has also explicitly recognized the need for class certification in lawsuits initiated by pre-trial detainees. Zurak v. Regan, 550 F.2d 86, 91-92 (2nd Cir. 1977), cert denied, 97 Sup.Ct. 2988 (1977). This Court should follow the clear direction of the United States Supreme Court and treat this as a live, justicible, controversy. See also, Jones v. Diamond, 519 F.2d 1090, 1097-1098 (5th Cir. 1975).

POINT II

PULLMAN ABSTENTION IS NOT WARRANTED IN  
A CASE INVOLVING ONLY FEDERAL CONSTITUTIONAL  
CLAIMS AND NO STATE LAW ISSUES HAVE BEEN  
PRESENTED

Relying on Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), Defendant Lombard erroneously suggests that the Federal courts should abstain from deciding this case because of the pendency of a case in state court, McNulty v. Chinlund, 89 Misc.2d 713 (Sup. Ct. Albany Cty. 1977).<sup>3</sup> This Court should not accept this novel and erroneous reading of the Pullman doctrine. Such a suggestion misconstrues the purpose of the abstention doctrine as well as the scope of the issues pending in state court.

In McRedmond v. Wilson, 533 F.2d 757 (2nd Cir. 1976), this court reviewed the essential conditions for invocation of the "extraordinary"<sup>4</sup> doctrine of abstention. There the court held that abstention will only be upheld when (1) the federal lawsuit involves an uncertain question of state law; (2) resolution of the

<sup>3</sup>

Apparently defendant Lombard recognized the futility of raising other abstention doctrines. Abstention based on the theory of Burford v. Sun Oil Co., 319 U.S. 315 (1943), is inapplicable because this case does not present any questions of state law let alone "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar." Colorado R. Water Cons. Dist. v. United States, 424 U.S. 800 (1976). Nor is Younger v. Harris, 401 U.S. 37 (1971) abstention appropriate because no state statutes are being challenged and no state court proceedings are being challenged.

<sup>4</sup>

County of Allegany v. Frank Mashuda Co., 360 U.S. 185, 188-189 (1959).



federal issue depends upon the interpretation given the state law, and (3) the state law is susceptible of an interpretation which would avoid the Federal constitutional issue. McRedmond v. Wilson, at 761.

It is clear that this case does not satisfy any of the prerequisites for abstention. First, there is no question of state law involved in this case. See, Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971). The only issue involved here concerns the detainees' federal constitutional right to receive visitors in a humane fashion consonant with their status as innocent persons. Second, it is equally clear that resolution of this issue does not depend in any way whatsoever upon the interpretation of any state law. Finally, a decision in McNulty v. Chinlund, supra, will not allow the federal court to avoid a decision on the plaintiffs' constitutional claim. If the Sheriffs eventually prevail in McNulty, all that will be decided is that defendant Commissioners of Correction do not, as a matter of state law, have the authority to regulate jail visitation. If the Sheriffs lose in McNulty there would have been no resolution of the constitutional right of innocent persons detained in jail to have contact visitation. In this regard, it should be noted that pre-trial detainees are not even parties to the state court proceeding.

Defendants' attempt to invoke the abstention doctrine in these circumstances ignores the standard adopted in McRedmond as well as the Supreme Court admonition in Procunier v. Martinez, 416 U.S. 396, 405-406 (1974). There the Court said:

When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.<sup>5</sup>

Defendant Lombard fails to cite - and plaintiffs are unable to find - a single authority which supports the proposition that the federal courts should abstain in this case. Plaintiff, therefore, respectfully urge this court to hold that the invocation of the abstention doctrine is unwarranted.

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Accord, Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 397 (2nd Cir. 1975) (the failure of public officials to remedy conditions in jails has required federal courts to take action "in the interests of fundamental decency and the protection of constitutional rights.")



POINT III

THIS COURT HAS APPELLATE JURISDICTION TO  
REVIEW THE DENIAL OF A CLASS CERTIFICATION  
MOTION

Plaintiffs contend that the District Court order denying class certification is appealable for two reasons. First, the order severely restricts the availability of injunctive relief and is therefore appealable under 28 U.S.C. §1292(a)(1). Second, that order was made in conjunction with the District Court's denial of preliminary relief. Since this Court clearly has jurisdiction to hear the appeal from the denial of preliminary relief it may also hear the appeal from the order denying class relief.<sup>6</sup>

Defendant Lombard next argues that the District Court properly denied the motion for certification of a defendant class because there were factual issues in dispute.<sup>7</sup> While plaintiffs dispute defendants' conclusion they enthusiastically endorse the argument that class certification should not be denied when there are relevant factual issues in dispute. Indeed, plaintiffs have

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<sup>6</sup> Contrary to the suggestions by defendant Lombard, plaintiffs have not relied on the "death knell" theory to support appellate review here. That theory applies only to cases where the monetary relief available to an individual plaintiff is so small that denial of a plaintiff class will result in the termination of the litigation. See, Green v. Wolf Corp., 406 F.2d 291 (2nd Cir. 1968), cert. denied, 395 U.S. 977; Shayne v. Madison Square Garden Corp., 491 F.2d 797 (2nd Cir. 1974); Note, Appealability of Class Action Determinations, 44 Fordham L. Rev. 548 (1975).

<sup>7</sup> Defendant Lombard's Brief at pg. 12.

argued that the District Court acted improperly when it made findings of fact based on statements in defendants' memorandum of law without holding a hearing. [A 111-113].

Additionally, contrary to the suggestion of defendant Lombard, the standard of review is not whether the District Court was clearly erroneous. Here, as in Munthevs Corp. v. Burgess Industries Corp., 535 F.2d 210, 211 (2nd Cir. 1976), the Court should find that:

Since the ruling below was solely on the pleadings, affidavits and depositions now before us not involving the assessment of credibility of witnesses before the trier, we may review the issue free from the usual "clearly erroneous" restriction.<sup>8</sup>

Defendant Lombard also confuses the prerequisites to class certification under Federal Rule 23. Rule 23(a)(2) requires that there are "questions of law or fact common to the class" [Emphasis added]. Plaintiffs have shown that they meet both tests. First, there is a common question of fact, that is, all the members of the defendant class deny pre-trial detainees contact visitation. Second, as Judge Laker found in Ambrose v. Malcolm, \_\_\_ F.Supp. \_\_\_ (Civ. No. 190, S.D.N.Y., May 16, 1977) (Slip opinion at pg. 4) (Appendix A to Plaintiff's Brief) the law of this circuit is that pre-trial detainees have a right to contact visitation. Thus, the denial of that right by members of the defendant class created a common question of law between them.

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This Court can make its own findings of fact. See Plaintiffs' Brief at pg. 19.



Finally, defendant Lombard fails to recognize that plaintiffs sought certification of a defendants class under Federal Rule 23(b)(1) or (b)(2); thus defendant Lombard's discussion of Rule 23 (b)(3) is puzzling.<sup>9</sup> Rule 23 clearly states that a party must satisfy only one of the three subdivisions of the Rule, not, as suggested by defendant Lombard, all three. Plaintiff have complied with the requirements of Rule 23(b)(1) and (b)(2),<sup>10</sup> thus defendant Lombard's reference to Rule 23(b)(3) should be ignored.

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<sup>9</sup> Defendant Lombard's Brief at pg. 23-24.

<sup>10</sup> See Plaintiff's Brief pages 20-31.

POINT IV

DENIAL OF PLAINTIFFS' REQUEST FOR A  
PRELIMINARY INJUNCTION WITHOUT  
HOLDING A HEARING WAS IMPROPER

Defendant Lombard makes two basic arguments in support of the District Court's denial of preliminary relief. First, defendant Lombard asserts that had the District Court granted the preliminary relief requested the status quo would have changed. However, plaintiffs in the District Court merely sought an order which would require the submission of architectural plans concerning the implementation of contact visitation. [A. 36-39]. Plaintiffs did not seek the immediate implementation of a contact visitation, but only a first step towards planning for the implementation of such a program.

Second, Defendant Lombard claims that the District Court properly found that the County Legislature was an indispensable party and thus correctly used this factor to balance the interests of the parties in deciding a motion for preliminary relief. Plaintiffs assert that County Legislators are not proper, necessary or indispensable parties. Additionally, assuming arguendo that legislators should have been parties, the District Court erred in responding to this problem.

The thrust of defendant Lombard's argument is that because court ordered contact visitation would necessarily cost money, the governmental body that raises and appropriates the funds used to operate the jail must be a party to the suit. While this argument



has superficial appeal it ignores several fundamental legal realities. In order to maintain county legislators as parties plaintiffs must maintain a claim against them. Apparently defendant Lombard would have plaintiffs argue that the failure of the County Legislature to appropriate sufficient funds states a claim. This approach, if followed, would require the Courts to sit in judgment over all legislative appropriations. The more realistic solution is to recognize that government officials charged with operating programs, like defendant Lombard, are given the choice of how to allocate funds appropriated to them. Once the funds have been appropriated it is the responsibility of their custodian, in this case the Sheriff, defendant Lombard, to see that the programs they operate are run in a manner which is consistent with the laws and the constitution. Also, defendant Lombard's argument assumes non-compliance with a court order by him. Plaintiffs assume that Sheriffs - like all other citizens - will obey the orders of a Federal Court. The proper procedure for the District Court is to order defendant Sheriffs to submit plans concerning the implementation of contact visitation, and if there is non-compliance additional relief can be fashioned then. Lasky v. Quinlan, 419 F.Supp. 799 (S.D.N.Y. 1976), reversed on other grounds 558 F.2d 1133 (2nd Cir. 1977). Certainly it was premature for the District Court to find county legislators were necessary parties at a stage of the litigation where only preliminary relief had been sought and compliance with court orders must be assumed. Thus, the District Court's conclusion that County Legislators should have been parties was legally

erroneous.<sup>11</sup>

Assuming for the sake of argument that County Legislators should have been a party to this lawsuit, the District Court erred in its treatment of the issue. Defendant Lombard failed to object in his answer [A. 74-75] or in any pre-pleading motion to the absence of a necessary party, thus he waived the objection. Moore's Federal Practice, §21.04[1], Vol 3A, pg. 21-18 (2nd Ed. 1974). Even if the District Court was raising the issue of necessary parties on its own initiative under Federal Rule 21, it should have granted plaintiffs an opportunity to add such parties before it denied plaintiffs' relief, Moore's Federal Practice, §21.04[1], supra or it should have ordered such parties added.

Thus, for the reasons set forth in plaintiff's brief and for the reasons outlined above, this Court should conclude that the District Court erroneously denied preliminary relief to plaintiffs and remand to the District Court for entry to an appropriate order.

<sup>11</sup>

In the previous "jail" cases involving New York City there were defendants other than Sheriffs; to wit, the Mayor. This alignment of parties was required because the jails of the City of New York are operated by the New York City Board of Correction. Detainees of the Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 399 (2nd Cir. 1975); Rhem v. McGrath, 326 F.Supp. 681 (S.D.N.Y. 1971), supplemental opinion after trial, 371 F.Supp. 594 (1974), aff'd, 507 F.2d (2nd Cir. 1974); §500-c of the New York State Correction Law.



POINT V

THE DISTRICT COURT FAILED TO FOLLOW THE  
LAW OF THIS CIRCUIT IN DENYING PLAINTIFFS  
PRELIMINARY RELIEF

Defendant Lombard apparently would have this court turn its back on its own clearly defined precedent and reject the constitutional mandate for contact visitation. Defendant Lombard's position, if accepted, would be a total reversal of this court's views as expressed in Rhem v. Malcolm, 527 F.2d 1041 (2nd Cir, 1975). This Court should reject the argument of defendant Lombard and find that the District Court applied an erroneous legal standard when it denied plaintiffs' request for preliminary relief.

Defendant Lombard makes two basic arguments in support of its view that contact visitation is not required by the Federal Constitution. Each argument is without merit. First, defendant Lombard suggests that contact visitation can only be ordered after a court views the totality of conditions in a particular jail. Whatever validity this argument may have had this approach was rejected when this court found that:

... an unconstitutional visiting booth  
is no less objectionable because its  
on Riker's Island rather than the  
Tombs.

Rhem v. Malcolm, 527 F.2d 1041, 1047 (2nd Cir. 1975)

Defendant Lombard fail to cite, let alone distinguish, the second Rhem case. Rhem v. Malcolm, 527 F.2d 1041 (2nd Cir. 1975). The only other pertinent case defendant Lombard cites comes from the

First Circuit, Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196 (1st Cir. 1974), cert. denied, 419 U.S. 977 (1975), and does not deal directly with the special legal rights of pre-trial detainees let alone contact visitation.

The second strain of defendant Lombard's argument is equally without merit. Defendant Lombard argues that because two other circuit courts have found that convicted felons do not have a right to contact visitation that the law in this circuit is unclear.<sup>12</sup> This argument is apparently premised on the belief that what is settled in the Second Circuit can become uncertain through the decisions of other circuits on cases involving different issues.

For the reasons set forth in plaintiffs' brief<sup>13</sup> this court should reaffirm its previous decisions on the issue of contact visitation and reject as devoid of merit the arguments of defendant Lombard.

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<sup>12</sup>

Defendant Lombard's Brief at pages 21-22.

<sup>13</sup>

Plaintiffs' Brief, pages 6-10.



CONCLUSION

This Court should, for the reasons stated above, reverse the determinations of the District Court on the issues of preliminary relief and class certification and should remand this matter to the Chief Judge for reassignment to a different judge in the Western District of New York.

Dated: October 26, 1977

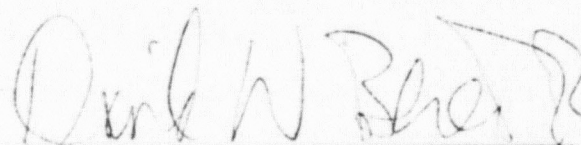
Respectfully submitted,

MONROE COUNTY LEGAL ASSISTANCE  
CORPORATION  
DAVID W. BEIER III, ESQ.  
Attorney for Plaintiffs  
Office and P.O. Address  
80 West Main Street  
Rochester, New York 14614  
Tel. No. 716-325-2520

AFFIDAVIT OF SERVICE BY MAIL

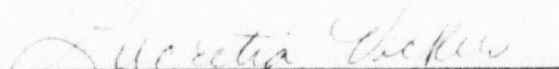
DAVID W. BEIER III, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 80 West Main Street, Rochester, New York.

On October 27, 1977 deponent served by mail two (2) copies of appellant/plaintiff's reply brief in the case of Marcera v. Chinlund (2nd Cir. Docket No. 77-2090) upon John D. Doyle and Paul O. Harrison, attorneys for respondents/defendants in this appeal at 39 West Main Street and 65 Broad Street, Rochester, New York respectively.



DAVID W. BEIER III

Sworn to before me this  
27th day of October, 1977.

  
Reg #9463350

LUCRETIA VICKERS

Notary Public in the State of New York  
MONROE COUNTY, N. Y. 78  
Commission Expires March 30, 1978



